

No. 253279-III

80999-2

COURT OF APPEALS

DIVISION III

OF THE STATE OF WASHINGTON

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DALE CAMPBELL and TINA FERIERA, Appellants

v.

TICOR TITLE INSURANCE COMPANY, Respondents

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APPELLANTS' REPLY BRIEF

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## I. ARGUMENT

1. Sound Public Policy Requires that both the Duty to Defend and Obligation of Good Faith and Fair Dealing be Imposed Under the Facts of this Case in order to Protect Appellants and Other Purchasers of Title Insurance from Overreaching by Title Insurance Companies.

Ticor argues that it had no duty to indemnify or defend its insureds against what it describes as a claim seeking “post-policy reformation of instruments currently affecting property other than the insured parcel.” Ticor also argues that it has no duty to indemnify or defend its insureds against a “potential boundary issue disclosed by a survey conducted after the policy was issued.” Neither of those arguments has merit as a matter of logic, and neither is supported by citation to any authority that is on point.

All claims that give rise to an insurer’s duty to indemnify and duty to defend necessarily arise after the issuance of the policy of insurance. Therefore, the fact that a claim arose after the issuance of a policy is meaningless. Furthermore, there is no authority whatsoever for the proposition that a complaint seeking, among other relief, the reformation of a deed to alter the boundary lines of the property described in the deed does not affect title to the property. Clearly, such a claim does affect title

to the property and constitutes a “defect in or lien or encumbrance on the title” expressly insured against by Ticor’s policy.

Ticor’s argument that the Edwards lawsuit falls within the policy exclusion for “[e]ncroachments and questions of location, boundary and area disclosed only by inspection of the premises or by survey” is likewise without merit. Edwards seeks a declaration of a right to an easement over Appellants’ property or, alternatively, a reformation of the deed to move the boundary of Appellants’ property to allow Edwards to access the lake over what is now Appellant’s property but would become part of the adjoining parcel. Both requests for relief are based solely upon the recorded “Declaration of Pedestrian Easement.” The mere fact that a survey showing the exact location of the recorded easement was conducted after the policy was issued does not make the existence of the claimed easement a matter that could be discovered only by an inspection of the property or by a survey. In fact, an inspection of the property or a survey would not, by themselves, reveal the existence of the claimed easement. The existence and location of the easement as shown on the survey is dependent entirely on the description contained in the “Declaration of Pedestrian Easement.” Thus, the exclusion under paragraph B of Schedule B of the policy does not apply.

Ultimately, the position taken by Ticor in this litigation comes down to its assertion that the “Declaration of Pedestrian Easement,” although recorded with the Stevens County auditor, was not “disclosed by the public record.” Ticor bases that assertion on the fact that the Declaration of Easement states on its face that it burdens only the parcel adjacent to Appellant’s property. Ticor characterizes as “strained” Appellants’ interpretation of the phrase “disclosed by the public record” to include all documents properly recorded in the county where the property lies, regardless of whether such document expressly states that it affects title to the insured property.

Ticor’s position is wrong as a matter of law and, if accepted, would result in a rule that would prevent citizens of Washington State from obtaining the primary benefit of title insurance.

Language in an insurance contract is to be given its ordinary meaning. Where two constructions are possible, the “construction most favorable to the insured must be applied.” *Nautilus, Inc. v. Tansamerica Title Insurance Company*, 13 Wn. App. 345, 349, 534 P.2d 1388 (1975) quoting *Selective Logging, Co. v. General Cas. Co.*, 49 Wn.2d 347, 351, 301 P.2d 535 (1956). A construction which contradicts the general purpose of the contract or results in hardship or absurdity is presumed to be unintended by the parties. *Id.*

A policy of title insurance is more than a simple representation that the title company has searched the public record diligently and not found any liens or encumbrances other than those listed as exceptions in the title report. Rather, a policy of title insurance, by its very language, is a guarantee that the insurer will receive clear title except for those liens and encumbrances noted in the policy as exceptions.

In the case of a title insurance policy, the insurer undertakes to indemnify the insured if the title turns out to be defective. That is the purpose of procuring the insurance . . . The doctrine of skill or negligence has no application to a contract of title insurance.

*Shotwell v. Transamerica Title Insurance Co.*, 91 Wn.2d 161, 170, 588 P.2d 208 1978) quoting *Maggio v. Abstract Title & Mort. Corp.*, 277 App. Div. 940, 941, 98 N.Y.S.2d 1011, 1013 (1950).

Ticor's argument that it is not bound to either indemnify or defend Appellants against Edwards' claims because the "Declaration of Pedestrian Easement" does not expressly state that it burdens Appellants' property undermines the very purpose of title insurance; i.e., to guarantee that the insured will receive clear title to the property. Toward that end, the insurer agrees to defend against any defects in title except those specifically excluded. A claim of ownership in or right to the use of property based upon a publicly recorded document clearly represents a "defect" in the title, and the purchaser of title insurance would reasonably

expect the title insurance company to defend and indemnify against such a claim, even if the language of the recorded document did not clearly identify on its face that it created an interest in the insured's property.

It is Tigor's, not Appellants', interpretation of the phrase "disclosed by public record" that is strained. Tigor does not contend that the "Declaration of Pedestrian Easement" was not properly recorded with the Stevens County Auditor or that it was somehow not discoverable by a search of the public records. In fact, Tigor does not even contend that it was unaware of the recorded "Declaration of Pedestrian Easement" at the time it issued its policy. Rather, Tigor contends that the easement was not "disclosed" because the document creating the easement did not expressly state that it affected the subject property. What Tigor argues in effect is not that the "Declaration of Pedestrian Easement" itself was not "disclosed by the public record" as it clearly was, but that the possibility that the easement might affect the subject property was not "disclosed" on its face. That possibility, however, is exactly what title insurance is supposed to protect the insured against. For Tigor to assert that it need not even defend against a claim based upon such a recorded instrument undercuts the very purpose of obtaining title insurance in the first place.

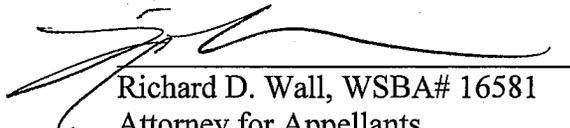
By refusing even to defend against the Edwards lawsuit, Tigor has placed Appellants in a position that, for many if not most similarly

situated insureds, simply cannot be maintained. Not only must Appellants maintain a defense against the Edwards suit at their own expense, they must also bear the expense of prosecuting this action against Ticor in order to obtain benefits under the policy to which they are clearly entitled. Many insureds will simply not be financially able to defend against one lawsuit and pursue another against the insurer at the same time. As a result, they will either bear the cost of defending the action entirely on their own or be forced to compromise and settle the claim by relinquishing property rights to the claimant. Ticor, being well aware of the position of its insured under such circumstances, thereby benefits from the likelihood that its decision to deny coverage will never be challenged.

The result is that the fundamental policy behind the duty to defend and the duty to act in good faith imposed upon insurers under Washington law is seriously undermined. Insurers will be encouraged to act first in their own financial interests and in the interests of their insureds only when there is clearly no other choice. This is especially true with respect to tile insurance, which is less competitive than many other types of insurance due to the limited number of tile insurance companies, and is particularly true in rural or less populated areas where there may be little competition or no competition at all.

Ticor is well aware of its obligations under Washington law and of the rule that any ambiguity in the language of an insurance contract must be construed in favor of the insured. Ticor is also well aware of the extent to which its refusal to defend in a situation such as this results in severe hardship to its insured. Nevertheless, Ticor argues that it need not defend its insured because Edwards' claim against Appellants is without merit in that the recorded easement burdens only the adjoining property and not Appellants' property. Appellants do not disagree with Ticor on that issue. However, the place for that argument to be made is in defense of the Edwards lawsuit, not here as an attempt by Ticor to avoid its clear duty to defend its insured against such claims. The trial court should be reversed and judgment entered in favor of Appellants as to all claims against Ticor, including Appellants' claims for bad faith and violation of Washington's Consumer Protection Act.

Respectfully submitted this 19<sup>th</sup> day of December, 2006.

  
Richard D. Wall, WSBA# 16581  
Attorney for Appellants

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19<sup>th</sup> day of December 2006, a true and correct copy of the foregoing REPLY BRIEF was mailed via U.S. mail, first-class, postage prepaid, to the following:

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